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In the

Supreme Court of the United States

October Term, 1967

No. 857

JAMES MILLER, a/k/a FRANK JAMES COPPOLA
Petitioner

vs.

UNITED STATES OF AMERICA
Respondent

PETITIONER'S REPLY BRIEF

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REPLY BRIEF FOR PETITIONER

I. *Jury threats*

Since the judge's examination of the jurors who were threatened during the trial, which respondent labels "a full and fair investigation" (Br. 12), was so brief, it is set forth in full below, together with some annotations:

CHAMBERS HEARING

JUNE 1, 1966

(Tr. Vol. XVIII)

The COURT. Mr. Lester, Mr. Parsons and Mr. Baldwin are present. I think it was early last week that it came to my attention through one of you and the Clerk Mr. Markowski, to whom

one of you spoke, that someone at the dinner party had made a remark to Mr. Lester, repeated a rumor that he had heard in Torrington, is that right, Mr. Lester?

Juror LESTER. That's right.

The COURT. Something to the effect that — well, suppose you tell me what it was?

Juror LESTER. Well, do you want the names?

The COURT. No, I'm not too concerned about the names of who told you, but what was said. First, what was said that caused you some concern at the time about this case?

Juror LESTER. Well, in the first place, I happened to be a Warden in the Borough of Litchfield and there are always people that talk to you about these things, and some of the ordinances, and so forth. In Litchfield, if they don't like something, we get some nasty remarks. This was at a party, and a fellow that I know very well and was serving the drinks there — I have forgotten how it came up — well, everybody knows that we are on the jury over there in Litchfield. We don't say anything. But he said, "I'm just going to warn you that another man here in Litchfield told me that" — he put it this way, "When this is over" — he was talking about this trial — "that unless you're very careful" — and I believe that's the way he put it — "that there is a bunch in Torrington who are going to get after you and beat you up." He said, "They don't want to kill you, but they don't like what is going on."[1]

That's as near as I can recall the way he put it.

The COURT. You then told Mr. Baldwin?

Juror LESTER. Yes. We drive over together.

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[1] The judge never ascertained from the jurors whether they interpreted the remarks as a threat against acquittal or conviction.

The COURT. And Mr. Parsons knows about it, you are all from the same area, you travel over together.

Now, the question is whether or not this statement and these circumstances have intimidated you or will have any effect upon you to decide the case on the evidence and that you are free from prejudice and fear of any kind.

Now, before I ask you to answer that it is possible — I mean this can be a subtle thing. It may be a rumor that is just loose talk, but it might be designed, if it is designed, to reach your ears. It might be to make you stiffen up and say, "No one is going to intimidate me."

On the other hand, it may be to intimidate you. I don't know what it was designed to do.[3] But the question is whether or not, in the face of that remark and those circumstances of which you are aware you feel in your own mind that it will have no effect whatsoever upon your decision in reaching a verdict in the case?[4]

Juror PARSONS. No.[5]

Juror BALDWIN. No.

Juror LESTER. Not a particle.

The COURT. Does anybody else in the jury know about this?

Juror BALDWIN. No.

Juror PARSONS. No.

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[3] The judge had no idea what the threat was designed to do and never permitted the jurors to express theirs.

[4] One of many leading questions which a lawyer would not have been permitted to ask.

[5] What does the answer "No" mean to a question, "whether or not"? The judge didn't inquire.

Juror LESTER. Absolutely not. I believe you should mention something about that place over there.[5]

Juror PARSONS. You have two locations in Torrington that have not a very good reputation. I don't know if "reputation" is the correct word, but I have heard it. I have grandsons and one is 20 and one is 16 and they get around and they mentioned back awhile that out around the Dunkin Donut, which is a 24-hour deal in the shopping center there is dope being peddled around there.

The COURT. Where?

Mr. PARSONS. Around Dunkin Donut in Torrington in the shopping center. And, of course, the Litchfield Farm Shop up on East Elm Street is in the same location as the First National which is kind of a shopping center and it is getting to be quite a place also where they hang around. So those are two places.

The COURT. What you are saying is that it may not be just a kidding rumor, somebody may have talked?[6]

Mr. LESTER. No, I don't think so.

Mr. PARSONS. No, sir. Possibly, but that doesn't affect me any, only to the extent that I have grandsons, and so forth.[7]

The COURT. Well, this is not going to prejudice you in deciding the case?[8]

Mr. PARSONS. No, but what Mr. Lester referred to, we had

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[5] Shows that a least two of the jurors have been discussing "that place over there" and strongly suggests that they see a connection between "that place" and the threats.

[6] This question and its answer are meaningless. The jurors were never asked what connection, if any, they saw between the dope peddlers in Torrington and the "bunch in Torrington" that was going to beat them up. Had there been a question, the answer is obvious.

[7] The juror's concern for his grandsons was ignored by the judge.

[8] Another leading question, to which there could be only one answer, and which also tried to change the subject.

talked a little about it and I know of these two places where there is a great possibility that this stuff might be handled, if you want to put it that way. That's all there is to it.[9]

The COURT. But that has nothing to do with the case so far as we know?[10]

Mr. LESTER. No.

Mr. BALDWIN. No, he just mentioned that.

The COURT. Well, the thing I am most concerned about in this case, naturally, is that we have spent five weeks on it and I don't want to see it go down the drain because some juror is either fearful or deciding it honestly and according to his conscience or because he is going to stiffen up and say, "Well, nobody is going to push me around," and then decide it on the basis of some consideration of that kind, but decide it fairly.[11]

Mr. PARSONS. It has nothing to do with me. I will say it the way I see it.

The COURT. All right.

(Whereupon the jurors returned to the jury room.)

After the above inquiry,[12] the judge impounded the transcript and denied the defense's motion for a mistrial (1456a). It was not until September 26, 1966, almost four months after

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[9] The juror did not immediately get his cue and attempted again to tell the judge something.

[10] This time, the judge made it plain that there was to be no more discussion of dope peddlers or grandsons.

[11] Could any juror have resisted this pressure, especially a juror who is cognizant of the fact that a mistrial would be necessary only because he violated instructions and discussed the case out of court?

[12] Respondent's claim that defense counsel suggested that no counsel be present during the judge's inquiry (Br. 10) is incorrect. The judge suggested it himself (1384a). Respondent also errs in suggesting that

the trial, that the transcript was released and the defense apprised of the nature of the threat, the content of the court's examination of the jurors, and the fact that, contrary to the court's promise, it had examined the three jurors together. And although efforts by the defense to investigate had been prevented by the judge's post-trial instruction to the jurors not to discuss the matter with the defense, the judge declined to give the defense a two-week postponement in which to investigate, denying the motion for a new trial on the same day that the transcript was disclosed.

Despite respondent's characterization of the threats as "cocktail party gossip (Br. 12), the record fails entirely to establish that the jurors so regarded the remarks and that they did not attribute the remarks to the defendant. The Government failed to meet its burden to establish, on the record, that the improper communications were harmless to the defendant, as required by *Remmer v. United States*, 350 U.S. 377, 379. Indeed, the record shows that the threats were highly prejudicial.[11]

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there was an express waiver by the petitioner of his right to be present at the judge's inquiry of the jurors (Br. n. 10). The waiver was only of the right to be present at a conference between the court and counsel regarding procedure (1382a). Moreover, the record does not support respondent's claim that defense counsel asked the judge to conduct an inquiry to "determine the effect of the threat upon the partiality of the jurors involved" (Br. 10). Rather, the defense agreed that the court should make its own inquiry into the nature and extent of the improper communication (1383a-1391a). In any event, the defense expressly demanded the right to have all the information at the conclusion of the trial and to investigate the matter itself (1386a). The defense also insisted, and obtained the court's agreement, that the jurors would be interviewed individually (1388a). All these stipulations and reservations were later disregarded by the court.

[11] Despite, if not to some extent because of, the judge's inquiry, the threats were prejudicial to the defendant in at last two ways: (1) Because the jurors attributed the threats to dope peddlers, this removed

In arguing to the Court of Appeals about the effect of the threats on the minds of the jury, Government counsel expressly went outside the record to inform the court that the Government had investigated the matter and ascertained that the remarks were harmless cocktail party gossip. In view of this representation, which presumably influenced the court below, petitioner feels entitled to refer to the results of his own investigation, undertaken after the petition for certiorari was filed (and disclosed to the Solicitor General by letter January 5, 1968). That investigation (See affidavit of Virginia Samon included as an appendix to this brief) shows that: (1) no representative of the United States Government made any post-trial inquiry of the jurors in question regarding the threats; (2) the jurors were so frightened by the threats that one carried a shotgun around his home and all three sought and obtained police protection during the trial, which fact they did not reveal to the judge; (3) the two jurors who attempted to tell the judge about the dope peddlers in Torrington thought that the threats had come from that source, which they associated with the defendant. In short, had the Government conducted the investigation which it said it had, it would have found the facts to be precisely those which fairly shriek from the record itself.

II. *The alias and the arrest record*

(a) Respondent's assertion that "Prior to trial, the government informed the court that petitioner's true name was James

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all doubt in their minds that the defendant was guilty; (2) The jurors understood the judge's principal concern to be whether they would, out of fear, acquit the accused. Having naturally denied that they would do so, there was only one way in which they could clearly prove their denials: convict the defendant. Whatever they consciously entertained or succumbed to this temptation is impossible to know and is beside the point.

Miller and that Coppola was the alias" (Br. 7) has no support in the record. Moreover, there is nothing in the record to show that the *jury* was *ever* told that the Government conceded that its indictment was in error regarding the name of the defendant.

(b) The Government denies that petitioner was tried under a phony alias and says that the "alias [James Miller or Frank Coppola?] was an essential part of the government's case" (Br. 8). Yet respondent fails to deal with the point that the Government never introduced in its case-in-chief an iota of evidence that James Miller had ever used or been known as "Frank," "Frank Coppola," or "Frank James Coppola." Instead, it seeks to justify the indictment by the fact that the defendant claimed he was not Frank James Coppola but James Miller. Yet the defense was forced into this stance by the phony indictment. What the Government seeks to sustain, therefore, is an erroneous and inflammatory alias allegation made relevant only by the defense's inevitable efforts to deny it, which efforts would have been unnecessary had the court granted defendant's unquestionably meritorious motion to strike "Frank James Coppola" from the indictment at the conclusion of the Government's case.

(c) Respondent offers not the slightest justification for the introduction, on rebuttal, of the eighteen-year-old arrest record.

(d) The Government also fails to explain how the arrest record could have been admitted, assuming that it was otherwise probative, without revoking the rule which excludes hearsay evidence (See Pet. 16).

III. *Penalties for failure to testify*

Respondent attempts to justify the court's instruction to the jury that it could convict the defendant of the crime charged "unless the defendant explains the possession to the satisfaction of the jury" by showing that the court also told the jury that the prosecution has to prove its case beyond a reasonable doubt (Br. 18). Yet if the latter instruction would legitimatize the contradictory charge that the defendant's failure to explain may be taken into account, then *Griffin v. California,* 380 U.S. 609, should have been decided otherwise, for the jury in that case was similarly instructed. See *Id.* at 621 (dissenting opinion). Nor does the fact that the court told the jury that the defendant "in the exercise of constitutional rights . . . need not testify" cure the comment. The jury in *Griffin* was told the same thing. *Id* at 610.

Respondent argues that the "sole function served by the instruction on the statutory presumption was to allow the jury to infer that petitioner had knowledge of the illegal importation" (Br. 19). Yet that wasn't what the jury was told. In any event, it defies reality to suppose that a jury would have so understood the instruction even had it been so explained.

Even if the instruction complained of had not itself been a penalty for failure to testify, it would be when combined with the fact that the countervailing no-inference instruction was delayed until the jury had deliberated twenty minutes, and when the Government was permitted, by introducing the arrest record on rebuttal, indirectly to imply that the reason for the defendant's failure to explain was a criminal past. When all these errors are combined in one case, nothing significant remains of the defendant's Fifth Amendment rights.

IV. *Destruction and suppression of evidence*

(a) The Caron vehicle, which was delivered to Bridgeport Frank three weeks before Caron's arrest, was condemned and put into daily use months before the defendant was arrested (100a). Despite this fact, respondent implies that the defense waived its right to complain of the destruction of the evidence because it didn't demand to inspect the car until three months after defendant's arrest (Br. 13). This is absurd. Had the defense demanded to see the vehicle and to submit it to scientific examination to determine the identity of "Frank" on the day of the defendant's arrest, the demand would have been a useless gesture.

Respondent also suggests that the defense's desire to submit the car to fingerprint and other residue examinations for the purpose of determining the identity of the man at Bridgeport is an afterthought (Br. 13). Yet the record refutes this, for the defense expressly complained of the inability to make "scientific examinations, fingerprint examinations . . . and other . . . examinations" of the car in one of the many pre-trial motions which were summarily denied (101a).

(b) Regarding petitioner's complaint that the Caron children were hidden by the Government and never made available for an interview, respondent relies upon the alleged right of a witness to refuse to be interviewed. Yet the witnesses did not refuse to be interviewed and defense counsel never was permitted an opportunity to ask them if they would submit. Instead, Caron's wife and co-conspirator was awarded the absolute right to make the decision. What respondent ignores, in addition to the unfairness and artificiality of the approach

below, is the fact that Mrs. Caron was in a position to cut off the defense's access to the children only because the United States Government was hiding them. They were, for all practical purposes, in Federal custody.

Respondent adds the conjecture that the children wouldn't have helped the defense very much anyway, pointing out that they only saw "Frank" briefly (Br. 15, 16). Yet Mr. and Mrs. Caron, upon whose testimony defendant was convicted, also saw "Frank" only briefly. Their testimony is enough to send petitioner to prison for twelve years but that of their children (undoubtedly less corrupt and with less of a stake in the outcome than the parents) wasn't worth even being made available to the defense!

Respondent cannot seriously deny that a defendant, as a corrolary to his right to compulsory process, is entitled to interview witnesses before calling them, and that the court has authority to compel witnesses to submit to an interview. See *State v. Butler*, 27 N.J. 560, 143 A. 2d 530; *People v. Cordero*, 72 Cal. App. 526, 237 Pac. 786; *Wilson v. State*, 93 Ga. App. 229, 91 S.E. 2d 201.

(c) Caron falsely denied on the stand that he had been promised a pardon for his testimony. The trial judge told the jury in effect that there had been no evidence that Caron had been promised a pardon (See Pet. 23). Yet respondent defends the court's refusal to compel production of Caron's pardon applications, his letter regarding the pardon written to the Attorney General, applications and communications with the Immigration and Naturalization Service, and other statements by Caron, on the ground that he admitted *applying* for a pardon

and other officials admitted that they would support his application (Br. 17). (It was these officials whom the court told the jury had "no authority whatsoever" to obtain a pardon for the defendant). As it turned out, therefore, Caron's two and one-half years of garrulous captivity produced only a single statement written by him which was made available to the defense (the defense had a witness to swear to the statement anyway). That was Caron's letter to his wife, written two months before the trial, in which he stated, "At the next trial I am going to speak honestly and say that I lied in all my testimony, and that I do not know Frank" (766a-776a).

The defense was entitled to any prior statements of Caron which related to his expectations of a pardon, since they would tend to prove the falsity of his denial that he had been promised (or believed he had been promised) a pardon. As indicated by the judge's charge, the pardon issue was a critical part of the defense's attack on the witness, and the Government's failure to disclose a single statement relating thereto permitted Caron to foist a piece of perjury on the jury.

V. *Fundamental unfairness*

(a) Illegal surveillance.

Although it neither asserts that it has investigated the matters nor forthrightly denies that illegal surveillance was employed in this case, the Government labels petitioner's complaint as "unsubstantiated" (Br. n. 15). And indeed it is unsubstantiated, if for no other reason than that petitioner was never afforded the opportunity to produce evidence on the matter. At the hearing on the motion to suppress which is alluded to in the

Government's brief (n. 15), the defense had subpoenaed federal and state officials, and their surveillance records, but the court declined to take any evidence. Thereafter, the claims were renewed in Texas with the same result: summary denial without hearing.

Agents Fallon and Cozzi, in affidavits executed July 21, 1964, denied "wiretapping" (Tr. 2180, 3797-3805), though it was illegal surveillance and not wiretapping which had been alleged. Moreover, although one of the agents directly involved in the investigation of the case was the same Finbarr Murphy who planted a radio in an informer's car and overheard conversations of a defendant already under indictment, *Massiah v. United States,* 377 U.S. 201, his affidavit was not submitted. Furthermore, although Connecticut State Police officers Demlong and Maroney conducted surveillance of the defendant at the request of customs agents from November, 1963 until at least June, 1964 (1183a, 1187a), neither, so far as the record shows, has ever been asked if he conducted electronic eavesdropping or wiretapping.

Since it has recently become plain that federal agents regularly engaged in illegal surveillance during the 1963-1964 period, see Westin, *Privacy and Freedom,* 121-126 (1967) and often relied upon state police to do it for them, see *Id.* at 127-132, and since it is hard to imagine a case in which such surveillance would be more tempting to investigative agents than this one, the Government's consistently cavalier treatment of petitioner's allegations, and its failure in this Court even to assert that it has investigated the matter, does not comport with the Government's obligations under recent decisions of this Court. *Kolod v. United States,* 36 LW 3306 (1/29/68); *Black v. United States,* 385 U.S. 26; *O'Brien v. United States,* 386 U.S. 345.

(b) The identification process.

In *United States v. Wade*, 388 U.S. 218, this Court essayed the weaknesses and dangers of eyewitness identification and noted that the critical stage of the identification may occur at the lineup. In this case, there wasn't even a lineup when Caron selected the defendant. Caron came to identify the petitioner through a lengthy and basically unreconstructible process of interrogation, negotiation, picture exhibition and surreptitious observation, a procedure which makes the lineup seem foolproof by comparison. Caron had almost every conceivable inducement to identify a "Frank," and his memory mingled and confused images of photographs and faces so that his identification of the defendant five months after he began looking at photographs was virtually inevitable, whether defendant was guilty or innocent. *Cf*, Williams, *The Proof of Guilt*, 119-120 (3d ed. 1963).

(c) The means of meeting the misidentification.

If the Government ought ever to convict a person of a serious crime upon testimony like that used below, fundamental fairness requires that the accused be given every opportunity to prove the identification a mistake. Unlike the suspect selected from a lineup, petitioner and others similarly identified have virtually no way of exposing defects in the identification procedures. If the jury does not believe the alibi (petitioner had one of the strongest alibi defenses ever laid before a court), the defendant must prove who actually committed the crime. In this case, however, two of the most likely sources of evidence as to who committed the offense were denied the petitioner: the Caron vehicle in a preserved condition and the registration records of the Bridgeport Motor Inn (withheld from the defense until two years after the event when, as sources of wit-

nesses, they were worthless). Deprived of this evidence and severely handicapped by the delay of ten months between the crime and his arrest, petitioner's efforts to prepare a defense were crippled by the press stories planted by Government agents. These garish, inflated, false accounts so inflamed the community that petitioner's business was virtually destroyed and almost every potential source of evidence shunned him and his counsel. Relief from these oppressive conditions was repeatedly sought from the courts. Had some respite been granted,[*] petitioner might have been able, despite destruction and suppression of evidence by the Government, to obtain evidence sufficient for an acquittal. Instead, all relief was summarily denied without hearing.

* * *

Although petitioner has not undertaken to point out many respects in which his interpretation of the record differs from that of the respondent, there is one assertion which cannot go unchallenged. Respondent concludes its brief by asserting that the defense attempted at trial "to show that the person who received narcotics from Caron in Bridgeport was Frank Lucion . . . Mancuso . . . Frank Piccolo . . . or Frank Musial" (Br. 21). As respondent is well aware, the defense has never claimed that the man who committed the crime was anyone other than Mario Natalizio (See affidavit of Mr. Simons, submitted with motion to Court of Appeals to postpone decision on rehearing). No claim was ever made that any of the other individuals actually committed the offense.

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[*] As by compelling the Government to correct its announcement that the defendant was the number one figure in the largest narcotics ring ever captured, that he "masqueraded as a legitimate businessman," that he was not James Miller but "Frank James Coppola, a 37-year-old ex-convict," etc. See 102a-111a, 218a-245a.

Caron was asked on cross-examination if he hadn't held up eight to ten trucks with a man named Frank Lucien (579a). Frank Mancuso's[15] name came into the case because Caron had stated on October 21, 1963 (eleven days after his arrest, thirty days after his last delivery to Bridgeport Frank), "I am fairly sure that those photos [of Mancuso] are the man we have referred to as Frank, who was the contact man in Bridgeport, Connecticut, to receive narcotics on August 21st and September 21st," his "only reservation" being that "the subject is somewhat heavy to be Frank" (1150a). Frank Piccolo's name got into the case through a report of customs agent Fallon wherein it was stated that Caron, before identifying Miller, had identified a "Frank Piccolo" (1198a). The defense offered Frank Musial as proof that there were local hairdressers named Frank who were not the defendant.[16] All this was evidence that Caron's identification of petitioner was worthless; it was not evidence that each of these men had committed the crime.

Respectfully submitted,

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February, 1968

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[15] Respondent denies that Mancuso was known as "Frank" (Br. n. 13), yet the Government's own witness, agent Fenelon Richards, referred to him as "Frank Mancuso" (1148a, 1149a).

[16] The defense was forced into this position by Caron's perjurious testimony that Rivard, his Canadian boss, had told him that "Frank" was a hairdresser. This shocking piece of testimony never appeared in any of Caron's descriptions or references made to Government agents and recorded in their reports. Apparently, the Government would have us believe that after two years of unsuccessfully trying to recall something Rivard said about the Bridgeport man, Caron suddenly remembered that the Bridgeport man was said to be a hairdresser.

APPENDIX